STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

ROCK ISLAND CLEAN LINE LLC	:	
	:	
Petition for an Order granting Rock Island Clean Line LLC a Certificate of Public Convenience and Necessity pursuant to Section 8-406 of the Public Utilities Act as a Transmission Public Utility and to construct, operate and maintain an electric transmission line and authorizing and directing Rock Island pursuant to Section 8-503 of the Public Utilities Act to construct an electric transmission line.	:	No. 12-0560

REPLY BRIEF OF COMMONWEALTH EDISON COMPANY

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POST-HEARING REPLY BRIEF OF
COMMONWEALTH EDISON COMPANY

Commonwealth Edison Company ("ComEd") submits its Post-Hearing Reply Brief under the Rules of Practice of the Illinois Commerce Commission (the "Commission" or "ICC") and the scheduling Orders of the Administrative Law Judge.

I. INTRODUCTION

The evidence requires rejection of Rock Island Clean Line LLC's ("RI's") Petition. RI has not shown that it is a utility or that its concept for a 121-mi1e DC transmission line across Illinois (the "Project") can be certified. As ComEd and others have pointed out, the evidence shows the Project is incomplete and speculative and that RI is neither qualified to be a utility nor able to finance and construct the Project.

RI's Initial Brief,[1] despite its extraordinary length, does not focus on the facts as they exist. RI, rather, asks the Commission to accept its vision of a future where the Project's financial and operational obstacles are eliminated, its incomplete features are filled-in favorably, 4000 MW of new generation materializes and interconnects with the Project, and a thus-far

[1] The various parties are referred to herein by the same abbreviations as in ComEd's Initial Post-Hearing Brief. The parties Initial Briefs are cited to herein as "[PARTY] IB."

disinterested market enthusiastically embraces the Project. After all, cheap renewable wind energy, produced and paid for by folks in other states, and delivered to Illinois customers without added cost or risk to reliability, sounds too good to oppose. The trouble, however, is not with RI's vision; as ComEd explained in its Initial Brief, ComEd supports cost-effective renewable energy, transmission expansion, competitive generation, and efficient markets. The problem is RI's vision does not square with the record.

This proceeding is not about evaluating goals or visions. Sections 8-406 and 8-503 require that the Commission determine, on the record before it, whether RI is a public utility and to evaluate the Project as it exists, economically, financially, and operationally. 220 ILCS 5/8-406; 220 ILCS 5/8-503. While the law demands proof that a proposed project ***is*** necessary and that it can and will be financed and built, ComEd explained how RI relies, again and again, on ***aspirations*** in lieu of evidence of the current state of the Project or RI's capabilities. Staff and several intervenors made the same points.[2]

To recap – briefly: the Project has no customers, generation or load. The 4000 MWs of wind generation that RI assumes will use the line does not exist and RI cannot even point to prospective generators in any regional transmission operator's ("RTO") queue. There is no evidence of any competitive market failure now and the Project solves no reliability or transmission deficiencies. It was never included in the regional planning process and has never been shown to be the least-cost means of gaining "extra" reliability. The Project also remains critically incomplete. A new 765kV interconnection option emerged from a few lines of RI's surrebuttal testimony. There are grave doubts about whether the Project can be operated safely and reliably at anything near its advertised 3500 MW capacity; at least without hundreds of

[2] *See, e.g.*, Staff IB at 20-21, 23-24, 28-29; ILA IB at 16; IAA IB at 10-12.

millions of dollars of additional transmission upgrades that RI excludes from its Project for which it does not seek approval. RI's answer to potentially catastrophic stability concerns is as yet undeveloped "operating guides" that the PJM Interconnection, L.L.C. ("PJM") has considered only as a concept and that the Midcontinent Independent System Operator, Inc. ("MISO") has not reviewed at all. RI's brief tries to deflect this issue by reference to novel and proprietary "STATCOM" technologies, a notion neither reviewed or accepted by PJM and belatedly mentioned only in surrebuttal.

RI cannot begin to finance the Project, having less than 2% of the required capital. And, contrary to its studies' assumptions, RI cannot insulate Illinois customers from the Project's $2 billion price tag, let alone the additional costs of generators' interconnections or other network upgrades. Whether passed through to Illinois customers in power prices or rates, those costs cannot be summarily dismissed.

Just as importantly, RI itself is an under-capitalized speculative venture, one of a family of such ventures owned by a Texas-based investment company that has never built a transmission line. RI has no Illinois customers, promises Illinois nothing, and refuses to assume the permanent and unconditional obligations of a utility. Its primary target customers are unbuilt ***out-of-state*** generators. Illinois transmission customers, if there are any, would realistically be wholesalers and/or utilities, not the public. RI refuses to commit to building the Project, and refuses to adapt or expand it if there is public demand. There is nothing wrong with being a speculative developer, but it does not make RI a utility.

It is no answer that RI is "new and different." Illinois law subjects merchant developers to the same legal requirements under Sections 8-406 and 8-503 as traditional utilities. Non-traditional transmission developers like American Transmission Company, LLC ("ATC"), Ameren Transmission Company of Illinois, and ITC Holdings Corporation have met those

requirements, including securing funding. RI's failings stem not from its status as a merchant, but from the gaps and weaknesses in its proposal, its lack of financial and operational wherewithal, and its unwillingness and inability to commit to provide service to Illinois customers.

These proceedings are the final opportunity for the Commission to review RI's Project and analysis of the Project ***as it stands today*** – and RI and its parent, Clean Line Energy Partners LLC ("Clean Line"), ***as they exist*** – and they underscore the deficiencies in RI's requests. Whether in the future RI could meet the PUA's requirements is another and, at this stage, an academic question. But, were the Commission to grant RI utility status or grant it a CPCN for the Project, it would be unprecedented. The Commission should deny the Petition without prejudice to RI's ability to refile when and if it can establish its qualifications to be a public utility and meet the standards for certification of its project.

II. RULINGS ON MOTIONS TO DISMISS

A. ILA and IAA Motions to Dismiss (Ruling of March 18, 2013)

ComEd agrees with RI that an entity need not be a public utility before filing for a CPCN. *See* ComEd Response to ILA and Farm Bureau Motions to Dismiss. As ComEd stated in response to the Motion to Dismiss (at 4), that is not what the statute requires and adding that requirement would create a "Catch 22." Nothing in the Initial Briefs changes that conclusion. The Commission should deny RI's request for public utility status because RI has failed to ***prove*** it is qualified to be a public utility, not because of any pleading defect.

B. ILA's Renewed Motion to Compel the Commission to Consult with the Illinois Department of Natural Resources ("IDNR") (Ruling of Dec. 4, 2013)

ComEd shares RI's concerns regarding the applicability of the "consultation" provisions of Section 11 of the Illinois Endangered Species Act (520 ILCS 10/11) and Section 17 of the

Illinois Natural Areas Preservation Act (525 ILCS 30/17) to the Commission in a CPCN proceeding. However, there is no need to resolve this question on the pleadings. The record is now before the Commission. The burden that such statutes would impose, if they applied, is substantively modest – consultation – and the record shows that IDNR has been consulted. *See, e.g.*, RI Ex. 8.3 Rev. at 34-38; RI Exs. 8.8 - 8.9; RI Ex. 8.10 at 4; RI Exs. 8.11 - 8.12.

III. PUBLIC UTILITIES ACT § 8-406(A) – REQUEST FOR CERTIFICATE AS A PUBLIC UTILITY

RI seeks certification Section 8-406(a) to operate its Project as a transmission-only Illinois public utility. RI IB at 1. Transmission-only or otherwise, becoming a public utility is a serious step that confers legal powers the General Assembly reserved for regulated entities undertaking a continuing legal obligation to serve the public generally. ComEd explained why RI cannot qualify. *See* ComEd IB at 15-16. Staff and several intervenors also did the same. *See* Staff IB at 10; IAA IB at 7; ILA IB at 14. RI's Brief does nothing to resolve these serious shortcomings. RI cannot establish that it meets any of the key prerequisites to becoming a public utility.

A. RI Does Not Qualify as an Illinois Public Utility under the PUA

The PUA requires that an Illinois "public utility" "owns, controls, operates, or manages … for public use, any plant, equipment or property used or to be used for or in connection with" the transmission of electric energy. 220 ILCS 5/3-105. And, as the Initial Briefs showed, Section 8-406(a) of the PUA requires a CPCN from the Commission before a new utility can "transact any business in this State." 220 ILCS 5/-406(a). RI does not dispute the law, and its Initial Brief fails to show that RI can satisfy it.

1. RI Fails to Meet the Facilities Requirement

The Initial Brief of essentially every party noted that RI does not own, control, operate, or manage any electrical transmission equipment or property. *See* ComEd IB at 15-16; Staff IB at 10; IAA IB at 7. While RI's Initial Brief (at 26) may imply the contrary, the record confirms this fact. RI's own CEO testified:

> Q. And isn't it true that on the date of the filing of the petition and up to the time including today that Rock Island does not have any assets in Illinois that could be used to sell, transmit, or deliver electricity?
>
> A. That's true.

Skelly, Tr. 233:7-12. As a result, RI must argue that operating the Project in the future, if and when it is ever built and put into operation, qualifies it as an Illinois public utility ***now***. RI IB at 28. RI errs, for several reasons.

First, RI cannot prove it will own and operate a transmission facility, ***now or ever***. As the parties have repeatedly noted, RI refuses to commit to building or operating the Project, even if it obtains a CPCN from the Commission. *See* Skelly, Tr. 286:14-16; Berry, Tr. 1049:24 - 1050:5; Berry Add'l Sup. Dir., RI Ex. 10.13, 4:106-10; Berry Reb., RI Ex. 10.14 REV, 28:681-89; Naumann Dir., ComEd Ex. 1.0 2nd REV., 10:193-6 & fn.8. At best, RI may try to build, depending on future market developments and on its own future ability to secure financing. Berry Add'l Supp. Dir., RI Ex. 10.13, 4:106-10; Berry Reb., RI Ex. 10.14 REV, 28:681-89; Naumann Dir., ComEd Ex. 1.0 2nd REV., 10:193-6 & fn.8.

The ***potential*** to own and operate transmission assets in the future does not make one an Illinois utility. Being a public utility requires owning property that is "used or to be used" for utility purposes. 220 ILCS 5/3-105. The definition does not include entities that ***may*** own such

property in the future.[3] That same principle is reflected in Section 8-406, which only requires certification as a prerequisite to "beginning construction" of a transmission project. 220 ILCS 5/8-406(b). Absent at least a commitment to own or operate utility property, the applicant cannot hold itself out as offering a public service.

Second, the potential to own and operate a transmission facility in the future does not make RI a public utility ***now***. Until RI commits to use its property for utility purposes, it is not a utility. Both Sections 3-105 and 8-406 of the PUA are triggered either by owning qualifying assets or needing to be authorized to own and use such assets, i.e., beginning construction or contractual acquisition. Neither section of the PUA requires or authorizes an entity to become a certified utility in advance based on future intent.

The case law RI cites serves only to underscore this point. *See* RI IB at 25-26. In no case RI cites – or that ComEd has uncovered – has the Commission held that potential future ownership of utility assets was sufficient. Rather, in these cases, the utility was not just committed to owning and operating utility facilities, but also was (a) ready to commence construction upon certification, or (b) contractually bound to acquire existing utility property. *American Transmission Company L.L.C. and ATC Management Inc.*, Docket No. 01-0142 (Jan. 23, 2003) ("*ATC 2003*"); *Illinois Power Co. d/b/a AmerenIP and Ameren Illinois Transmission Co.*, Docket No. 06-0179 (May 16, 2007) ("*IP 2007*"); *Illinois Power Company d/b/a AmerenIP and Ameren Illinois Transmission Co.*, Docket No. 06-0706 (Order on Reopening, June 23, 2010); *Ameren Transmission Co. of Illinois*, Docket No. 12-0598 (Aug. 20, 2013). Both immediacy and certainty of commitment were present in every case.

[3] This is no "Catch-22" argument. ComEd does not argue, and the law does not provide, that RI must own transmission property before it can be a utility and must also be a utility before it can own transmission property. ComEd IB at 15, fn.9; ComEd Response to ILA and Farm Bureau Motions to Dismiss at 4. While presently owning a transmission facility is one way to meet the "asset" portion of the definition of a public utility, it is not the only way. But, RI must at least be committed to constructing and operating such an asset.

RI's brief stresses *ATC 2003.* In that case, the Commission granted a CPCN to the then-newly formed transmission company, ATC. *Id.* at 6-7. Unlike RI, however, ATC was committed to operating utility assets contingent upon only certification. Indeed, ATC was purchasing and taking over existing public utility assets of pre-existing utilities, under both Wisconsin law and a binding contract. Indeed, ATC was formed from 25 municipalities, retail electric cooperatives, and investor-owned utilities that each were to contribute their transmission assets and/or cash to ATC. *Id.* at 2. Unlike RI, ATC owned and was committed to own transmission assets serving the public when that it sought a CPCN under Section 8-406(a).

The Commission's decision in *IP* 2007 similarly fails to support RI. There, Illinois Power Company ("AmerenIP") and the company then known as Ameren Illinois Transmission Company ("AITC")[4] jointly sought a CPCN under Section 8-406(a). AITC and AmerenIP proposed to jointly fund, construct, and operate three new transmission lines to interconnect a generator being built. *IP 2007* at 3, 5. AITC was newly-formed, but the similarities to RI end there. AmerenIP was already an Illinois utility and AITC had the financial and technical support of a corporate family that gave it the financial and operational qualifications to acquire and operate transmission assets. *Id*. at 3. RI is a speculative, thinly-capitalized entity that could not today build or operate anything. Moreover, AITC was prepared to proceed; once it was certified, it built assets and began serving customers. In contrast, RI is committed to nothing and, even in its perfect vision, would not operate assets or have customers for years.

Finally, the CPCNs subsequently issued to Ameren Transco lend RI no support. *See* RI IB at 26 (citing *Illinois Power Co. d/b/a/ AmerenIP and Ameren Illinois Transmission Co.*, Docket No. 06-0706 (June 23, 2010); *Ameren Transmission Co. of Illinois*, Docket No. 12-0598

[4] Ameren Illinois Transmission Company subsequently became Ameren Transmission Company of Illinois ("Ameren Transco").

(Aug. 20, 2013)). They are CPCNs awarded to Ameren Transco after it had already qualified as a public utility, and are CPCNs for facilities under Section 8-406(b). They are not germane and serve only to draw attention away from whether RI is a public utility under Section 8-406(a).

2. RI Fails to Meet the Public Service Requirement

Even owning an existing electric transmission facility is not sufficient to make an entity an Illinois public utility. To be a public utility, those assets must be held for "public use" and the utility must offer service to the public generally, subject to statutory and regulatory requirements. *Miss. River Fuel Corp. v. Ill. Commerce Comm'n*, 1 Ill. 2d 509 (1953). All eligible customers must be offered service on non-discriminatory terms and conditions. *See* Staff IB at 10-12 (citing *Palmyra Tel. Co. v. Modesto Tel. Co*., 336 Ill. 158 (1929); *State Pub. Utils. Comm'n v. Bethany Mut. Tel. Ass'n*, 270 Ill. 183 (1915)). In addition, with exceptions not relevant here, a utility's offer of service cannot be terminated unilaterally as contemplated by RI's refusal to commit to build the project. A public utility can only abandon an offer of service with Commission permission. 220 ILCS 5/8-508 ("[N]o public utility shall abandon or discontinue any service or, in the case of an electric utility, make any modification as herein defined, without first having secured the approval of the Commission ….''). RI's claim that it will "hold itself out to serve the public" (RI IB at 26) does not square with the record, or even with RI's own stated plans.

First, RI's customers are not the general public. As Staff notes, RI aims to reserve up to 75% of the Project's capacity for contract anchor tenants in the Resource Area. *See, e.g.*, Petition at 11; Staff IB at 12. These anchor tenants are not Illinois customers but rather hypothetical future generators in Iowa and other "Resource Area" states. ComEd IB at 4, 16. Also, as a bulk power transmission facility, there is no realistic prospect that RI will be serving the Illinois public, *i.e.*, retail customers generally. Even if it were theoretically possible, Staff

demonstrated that Illinois customers are very unlikely to purchase transmission service from RI because they can acquire renewable energy credits ("RECs") rather than the renewable energy itself. *See* Zuraski Dir., Staff Ex. 3.0, 10:193 - 11:205.

At most, a limited group of utilities and Retail Electric Suppliers are potential customers under contractual arrangements similar to the hypothetical "subscriptions" that RI hopes will attract generators. Contractual sales to such limited groups do not make RI a public utility, but are analogous to the facts of *Mississippi River Fuel Corp. v. Illinois Commerce Commission*. There, the Illinois Supreme Court held that even ***retail*** sales did not qualify the company as an Illinois public utility. 1 Ill. 2d at 512.

RI obfuscates this issue by discussing different ways that retail customers could use power delivered over RI's line. *See* RI IB at 27-28. This misses the point. Transmission utilities provide service to their transmission customers, not to every person who subsequently sells or uses power that flowed on its line. Although both wholesale and retail entities in Illinois may purchase or use energy generated in the Resource Area, that does not make them customers of RI. Nor does RI offer or provide those end users with utility service.

Second, RI cannot hold itself out as providing utility services to the public generally. Again, if RI's subscriptions go as planned, RI would be left with less than 25% of the available capacity[5] to serve any Illinois customers, retail or otherwise. Staff IB at 12, Petition at 10. And, once subscribed, RI cannot offer to serve any additional customers. Staff points out there is "no evidence … that [RI] would be able to or willing to" expand the Project's capacity. Staff IB at 14. But, RI has itself gone farther. Before the Federal Energy Regulatory Commission

[5] ComEd has shown that the effective capacity of the Project would be far less than portrayed by RI, unless RI or the hypothetical wind generators were to build and fund significant network upgrades. *See* ComEd IB at 26-27.

("FERC"), RI stated it would be "unable" to expand the Project's capacity to serve any additional customers in the future. *See Rock Island Clean Line LLC*, 132 FERC ¶ 61,142, at PP 22, 33 (2012). This falls well short of what is required of a public utility in Illinois. *See Highland Dairy Farmers Co. v. Helvetia Milk Condensing Co.*, 308 Ill. 294, 300-01 (1923) ("When once determined to be a public utility under the statute the company must furnish [service to] all who apply ….").

Finally, RI cannot show it will ever attempt to develop the Project. *See supra* at 6. And, should financing not be available, generation not be built, or any other contingency fail to materialize, nothing in RI's Petition requires the Commission's permission before RI can walk away. That should alone end all debate about RI being a utility before committing to Project. Even if RI could somehow be deemed able to "offer" customers future service, if RI walks away from the Project that offer would be terminated and withdrawn which if RI were a utility would require Commission permission. 220 ILCS 5/8-508; *see also Interstate Power & Light Co.*, Docket No. 07-0246, at 7 (Nov. 28, 2007). RI's demand that it have a unilateral right to not pursue the Project is cannot square with RI being a public utility.

B. RI's Other Appeals for RI's Certification as a Utility Must be Rejected

Certain parties urge the Commission to certify RI based upon what amounts to policy grounds, without analysis of controlling law. Wind on the Wires ("WOW"), Environmental Intervenors,[6] and the International Brotherhood of Electric Workers ("IBEW") in substance ask the Commission to set aside governing law to achieve what they claim are potential environmental and economic benefits. *See* WOW IB 15; Environmental Intervenors IB at 23-24; IBEW IB at 3-4, 11-12. But, the Commission, like any agency, "'must construe the statute as

[6] The "Environmental Intervenors" are the Environmental Law and Policy Center and Natural Resources Defense Council

written and may not, under the guise of construction, supply omissions, remedy defects, annex new provisions, add exceptions, limitations, or conditions, or otherwise change the law so as to depart from the plain meaning of the language employed in the statute.'" *Divane v. Smith*, 332 Ill. App. 3d 548, 553 (1st Dist. 2002) (quoting *In re Tax Deed*, 311 Ill. App. 3d 440, 444 (5th Dist. 2000)). Deviating from it, or relaxing its requirements under the "guise of construction," would be legal error.

The policy arguments these intervenors make also fail on their merits. First, denial of RI's Petition will not discourage future merchant transmission projects. *See* IBEW IB at 9-10; Environmental Intervenors IB at 16. The PUA and the Commission's prior decisions do not discourage merchant transmission developers. Several funded, capable non-traditional developers do successfully operate in Illinois. Also, the supposed benefits RI cites cannot possibly be offered now. The generation does not exist and review in Iowa lags far behind this speculative case. ComEd Cross Ex. 3; Skelly, Tr. 235:8-16. Opposition in Iowa is growing, and additional legislative roadblocks have been proposed. *See* Iowa House File 2056.[7] There is no reason RI cannot apply for a CPCN if and when the market embraces its concept and if and when RI becomes capable of, and committed to, building its Project. In contrast, issuing a CPCN to RI, a speculative entity that has no customers, wholly inadequate financing, and will not even commit to the build its proposed Project, *see* Skelly, Tr. 233:2-6 & 286:14-16; Galli, Tr. 753:1-3, 754:6-7; Berry, Tr. 1049:24 - 1050:5, would send an unprecedented message that any developer with an ambitious business plan and start-up money could become an Illinois utility. To deny the petition without prejudice would not discourage merchant transmission development. It

[7] Available at http://coolice.legis.iowa.gov/Legislation/85thGA/Bills/HouseFiles/Introduced/ HF2056.html.

would discourage, as it should, entities from seeking certification and tying up the ICC's limited resources to consider an applicant's transmission "ideas."

There are also strong policy arguments to reject RI's request. Empowering private speculators with eminent domain authority will adversely affect private property owners, empowering RI to threaten Illinois landowners with condemnation upon "impasse." *See* McDermott, Tr. 170:24 - 171:4; Detweiler, Tr. 470:3 - 472:10 Indeed, the required impasse seems already at hand. Marshall, Tr. 630:8-21. If RI is correct that the market will see certification as a measure of the Project's reality,[8] then certifying RI on the basis of this record would mislead the market. RI is now unprepared to offer service, unwilling to commit to the Project, and unable to finance or construct the Project. There is no policy reason for Illinois to suggest otherwise.

IV. III. PUBLIC UTILITIES ACT § 8-406(B) – REQUEST FOR CERTIFICATE FOR THE ROCK ISLAND PROJECT

A Commission finding that a project "will promote the public convenience and necessity" can be made "only if the utility demonstrates" that each of the Section 8-406 criteria is met. *Commonwealth Edison Co.*, Docket No. 01-0833, at 7 (June 19, 2002); *Commonwealth Edison Co.*, Docket No. 01-0513, at 6 (Dec. 19, 2001); *Commonwealth Edison Co.*, Docket No. 96-0410; *Commonwealth Edison Co.*, Docket No. 92-0221. The same burden is imposed on a merchant developer. *E.g.*, A*m. Transmission Co.*, Docket No. 01-0142 (Jan. 23, 2003).

A. The Project Does Not Meet the Statutory Prerequisites for a CPCN

The statutory criterion for a Section 8-406(b) CPCN are:

(1) that the proposed construction is necessary to provide adequate, reliable, and efficient service to its customers and is the least-cost means of

[8] RI IB at 112-14, 164.

satisfying the service needs of its customers or that the proposed construction will promote the development of an effectively competitive electricity market that operates efficiently, is equitable to all customers, and is the least-cost means of satisfying those objectives;

(2) that the utility is capable of efficiently managing and supervising the construction process and has taken sufficient action to ensure adequate and efficient construction and supervision thereof; and

(3) that the utility is capable of financing the proposed construction without significant adverse financial consequences for the utility or its customers.

220 ILCS 5/8-406(b). RI must demonstrate it has satisfied each element before a CPCN can issue. *See, e.g., Commonwealth Edison Co.,* Docket No. 01-0833 (June 19, 2002); *see also Commonwealth Edison Co.,* Docket No. 92-0221 (Oct. 18, 1995); *Commonwealth Edison Co.,* Docket No. 96-0410 (May 6, 1998).

1. RI Must Meet its Burdens with Competent and Germane Evidence

To meet the Section 8-406(b) criteria, RI must present competent evidence, not speculation. *See Commonwealth Edison Co.,* Docket 92-0121 (April 12, 1995) (ALJs must recommend that Commission based decisions on record evidence, rather than speculation); *see also Ill. Commerce Comm'n v. C. Ill. Light Co.,* Docket No. 99-0013 (December 22, 1999) (rejecting speculative evidence). Evidence that ***might*** satisfy a statutory criterion is speculation and does not meet RI's burden.

The evidence relied on must also be germane to the statutory criteria. Subsection (b)(1) requires proof that the construction "is necessary" for present and future reliability or that the proposal ***will*** promote an effectively competitive market. 220 ILCS 5/8-406(b)(1) (emphasis added). While speculation remains improper, subsection (b)(1) calls for proof of what ***will*** happen absent construction. Subsections 8-406(b)(2) and (b)(3), however, unambiguously require proof of the applicant's ***present*** capabilities. Subsection (b)(2) requires for proof that the applicant "***is*** capable of efficiently managing and supervising the construction process and ***has***

taken sufficient action to ensure adequate and efficient construction and supervision" and subsection (b)(2) requires that the applicant utility "***is*** capable of financing the proposed construction." 220 ILCS 5/8-406(b)(2)-(3) (emphasis added).

RI has failed to carry its burden. ComEd and Staff agree that the evidence is too uncertain and the Project too speculative to justify a CPCN. *See* ComEd IB at 6-7, 11-20, 23-30; Staff IB at 45, 48, 56-59. Specifically, RI has failed to demonstrate that the Project will promote an effectively competitive electricity market; that it is necessary to ensure adequate, reliable, and efficient service; or that it is the least-cost means of achieving any reliability gain. RI has also failed to prove it can manage, supervise, or finance the Project's construction. RI's entire argument concerning financing ignores its present complete lack of financial capacity. While each of these failures is fatal in and of itself, in the aggregate they leave no doubt that RI's Petition should be rejected.

2. The Project is Unnecessary to Promote Competition or Reliability

As Staff points out, RI must show the Project is sufficiently needful or useful to the public to warrant its expense. *See* Staff IB at 17-19. The need must be related to market development or adequacy and reliability, and it must be least-cost in either case. RI does not disagree.

a. The Project Itself Is Uncertain and Speculative

As ComEd explained, RI has failed to prove that the Project satisfies either criterion, in large part because so many essential elements of the Project and its operation remain incomplete, untested, and aspirational. ComEd IB at 21-32. Several parties, including Staff, also note the proposal's considerable uncertainty. Staff IB at 20-21, 23-24, 28-29, 58; ILA IB at 16; IAA IB at 10-12. The briefs of RI and its supporters, while long in volume, are short in firm commitments and assurances.

Most problematic to RI is the absence of current or committed customers. According to RI, future customers will bear the full cost of the project. *See* Skelly, Tr. 286:14-16; Berry, Tr. 1049:24 - 1050:5; Berry Add'l Supp. Dir., RI Ex. 10.13, 4:106-10; Berry Reb., RI Ex. 10.14 REV, 28:681-89; Naumann Dir., ComEd Ex. 1.0 2nd REV., 10:193-6 & fn.8. While RI and supporters maintain that the Resource Area is flush with "potential customers," *see* WOW IB at 16; RI IB at 49-53, not a single entity has committed to purchase transmission service if the Project is built. Wallack, Tr. 820:3-5; McDermott Tr. 122:22 - 123:5; Galli, Tr. 753:1-3; Berry, Tr. 1061:2-19. Indeed, RI has not even begun soliciting customers. Galli, Tr. 754, 6-7. And, there is no proof that hypothetical generators will be built, will ever subscribe to the Project, or will ever spend the additional millions required to interconnect with it.

The absence of customers is not, as WOW, Environmental Intervenors, and IBEW suggest, a formality flowing from differences in timing between generation and transmission projects. WOW IB at 15-16; IBEW IB at 9-10; Environmental Intervenors IB at 15-16. To the contrary, they cite no evidence assuring future customers; their argument is optimistic speculation.

This is a critical failure with long-reaching implications that sheds considerable doubt over the Project's viability. Unable to finance the Project on its own, *see* Berry, Tr. 1060:21 - 1061:1, RI plans to access financial markets to construct the Project, and utilize the rates paid by generators in the Resource Area to repay its debts. RI IB at 106-07; Berry Dir., RI. Ex. 10.0, 31:656 - 32:661. RI's witnesses readily acknowledged that insufficient demand for the project would hamper RI's ability to finance the Project. *See* Berry. Add'l Supp. Dir., Ex. 10.13, 4:107-10; McDermott Reb., RI Ex. 4.2, 7:147-49. Though RI and its supporters have continually highlighted the theoretical demand for renewable resources, RI's witnesses also have acknowledged they are unsure whether demand will be sufficient to complete the Project. Berry

Add'l Supp. Dir., Ex. 10.13, 4:107-10 ("[P]ermanent installation of facilities cannot and will not commence ***unless and until the need for the Project is actually established*** through the market test of transmission customers contracting for sufficient service on the transmission line to support and justify financings that raise sufficient capital to cover the total Project cost." (emphasis added)). The entire Project remains speculative and RI leaves open the prospect of abandoning the Project altogether. *See* Skelly, Tr. 286:14-16; Berry, Tr. 1049:24 - 1050:5; Berry Add'l Supp. Dir., RI Ex. 10.13, 4:106-10; Berry Reb., RI Ex. 10.14 REV, 28:681-89; Naumann Dir., ComEd Ex. 1.0 2nd REV., 10:193-96 & fn.8.

Similarly unclear is the quantity of energy that the Project can reliably transmit, even if the hypothetical generation was built and interconnected with RI. RI promotes the Project as being capable of delivering 3,500 MW of energy. However, in order to reliably transmit more a far smaller value – 700 MW, with the prospect of an additional 492 MW resting on an as yet incomplete PJM study[9] – RI assumes that as yet uncompleted and untested operating guides will work. To work, operating procedures must be developed to accomplish the curtailment of 2,800 MW (a quantity greater than the output of two nuclear plants) across the PJM-MISO interface in less than 30 minutes, but offers no evidence that any specific procedures have been reviewed or approved by PJM, MISO, or FERC, or that such procedures have even been developed. RI IB at 86-91; Naumann, Tr. 962:16 - 965:6. The best evidence – and the only evidence from any witness with any PJM, MISO, or ComEd operational experience at all – is that the guides will not work. Naumann Reb., ComEd Ex. 4.0 REV, 8:161 - 11:225.[10] What is more, this limitation

[9] Naumann Reb., ComEd Ex. 4.0 REV, 15:303 - 18:354.

[10] *Compare* Galli, Tr. 764:8 – 765:15 (showing that Mr. Galli has no experience working as a transmission operator or planner in the PJM region), *with* Naumann Dir., ComEd Ex. 1.0 2nd REV, 3:45-58 (showing that Mr. Naumann has "almost forty years of experience in dealing with transmission matters" in PJM and MISO, and "[t]hat experience includes planning, technical analysis, reliability, security, and regulation"), *and* ComEd Ex. 1.01 (same).

is not a question of firm or non-firm transmission. It is a limitation on the energy flow, and one wholly inconsistent with the basic premises of the RI concept.

Perhaps recognizing the weakness in its reliance on complex untested and undeveloped operating guides, RICL claimed belatedly in surrebuttal that a novel and proprietary type of static synchronous compensator ("STATCOM") can address this issue. The idea of using these unproven devices in lieu of the undeveloped operating guides has never been accepted by PJM, even in concept, and neither is it properly presented in this record. *See* Galli Sur., Ex. 2.15, 20:424-427, 23:503 - 24:517 (first reference in testimony). Moreover, the STATCOMs themselves are not the sole issue; the complex communications coordination is equally untested and unsupported by this record. RI further muddies the waters by claiming "STATCOM" are "FACTS" or Flexible AC Transmission System elements, a broad category of devices that use solid state switching, and include the proven and unproven, the reliable and the experimental. The Commission, in short, cannot rely on RI's belated invocation of STATCOMs.

b. RI's Claim that the Project Will "Promote Development of an Effectively Competitive Electricity Market" Also Fails Due to Its Flawed Underpinnings

Contrary to RI's claims, the Project has not been shown to promote the development of an effectively competitive electricity market, even if it were ever built.

To begin with, RI and its supporters posit that the Project will increase the supply of low-cost renewable energy to Illinois customers, suppressing energy and REC prices. *See* RI IB at 30, 42-49, 69 & fn.66; Environmental Intervenors IB at 4-13; WOW IB at 6-13; IBEW IB at 6-7. However, RI cannot even establish the Project will carry renewable energy. Rather, RI and its supporters speak only to their belief that future customers will be renewable resources. *See* RI IB 49-53; *see also* WOW IB at 16; Environmental Intervenors IB at 15-16. RI does not, and cannot, assert that it has any commitments from any generators now in development. Moreover,

the Production Tax Credit that subsidized wind development has expired[11] and RI cannot tilt the Project to favor renewable resources. RI initially attempted to bill the project as a transmission project to import renewable resources. *See* Petition at 2; *Rock Island Clean Line LLC*, 139 FERC ¶ 61,142 at P 3. FERC rejected that proposal, holding that RI must serve all customers – whether wind or coal powered – equally. *See id.* P 31. Prohibited by federal law from giving preference to renewable resources, RI cannot predict the resource mix or the cost of the resources developed in the Resource Area. The Initial Briefs filed by RI and its supporters concede that the Project has no customers and cannot control what, if any, customers it ever has.

RI promises that Illinois customers will pay none of the costs of building and maintaining the line because these costs will supposedly be paid for by subscribing wind generators (RI IB at 6) and its economic studies rely on that assumption. McDermott, Tr. 122:9-16. That unrealistic assumption is fatal. To begin with, without customers, generators, or market interest, there can be no assurance of such "merchant" funding. Indeed, RI expressly leaves open the possibility of turning its back on this premise and directly recovering the Project's costs from retail ratepayers. *See, e.g.*, Skelly, Tr. 277:6-10. Likewise, RI cannot presume that wind generators, if they are built, will shoulder the nearly $2 billion cost of the Project, let alone additional interconnection costs. In, Mr. Zuraski's words:

> To be a financial success, the costs of the Project and the costs of those wind farms utilizing the Project must be recovered. Whether selling directly to retail customers (who I called "ratepayers") or indirectly to retail customers through an intermediaries (such as a utility companies [*sic*], alternative retail electric suppliers, or other load serving entities), this condition implies that the costs are ultimately recovered by retail customers.

Zuraski Reb., Staff Ex. 6.0, 6:145-53. Generators are economically motivated, and will not absorb the Project's considerable price tag. They will pass them on to customers, just as Mr.

[11] *See ISO New England*, 146 FERC ¶ 61.048, at P 33 (2014).

Zuraski explained that sales taxes are passed on to customers through the workings of an efficient market. Zuraski, Tr. 681:6-9. Moreover, as admitted by Dr. McDermott, RI's analysis ignores the costs that wind generators will pay to interconnect to RI's facilities. McDermott, Tr. 133:8-12.

Mr. Moland and Dr. McDermott, the RI witnesses who claim the Project promotes a competitive market, base their conclusions on these same speculative assumptions about the nature of the generation and recovery of the Project's cost. For example, Mr. Moland and Dr. McDermott use a 100% wind profile when conducting their analyses, but RI cannot assure that the Project will carry 100% wind. McDermott, Tr. 122:17-21; Galli, Tr. 757:14 - 758:8. In fact, RI cannot guarantee that the Project will carry only wind, or any wind at all. RI must serve *any* type of generator that seeks to interconnect to the Project, whether that generator is coal, gas, nuclear, or any other non-renewable form. RI actually told PJM that PJM could not assume that RI should be modeled as "a wind-sourced injection," ComEd Ex. 1.0, 40. Yet, RI's economic analysis rest on the contrary assumption. McDermott, Tr. 122:17-21.

RI also ignores the substantial costs of network upgrades originally assigned to RI during the initial facilities study from its economic analyses. Galli Reb., RI Ex. 2.11 REV, 12:258-260. Even if the so-called operating guides work (a dubious assumption), RI itself may dodge those costs. Indeed, ComEd's expert witness Mr. Naumann testified that these costs have not disappeared, but will be imposed on the generators if they desire to consistently deliver the levels of energy assumed in RI's economic models. Naumann Reb. Ex. 4.0, 3:58-59; Naumann Tr.

965:7-20. These hundreds of millions of dollars in upgrades costs are likely to be imposed on potential wind generator customers, who will pass these costs along to Illinois customers.[12]

Finally, Staff appears to take comfort in RI's classification of this project as a merchant project, but RI cannot and will not disavow seeking rate recovery itself, nor can RI assure that third parties (*e.g.*, subscribers) will not sidestep the Commission and directly ask FERC to impose costs on ratepayers.

c. RI Has Not Shown that the Project is Necessary to Provide Adequate, Reliable and Efficient Service

The record shows – without contradiction – that Illinois's electricity system is adequate, reliable, efficient, and competitive. RI does not argue otherwise. *See* RI IB at 61; McDermott, Tr., 162; Galli, Tr. 749-750. And, Staff, like ComEd, questions whether the Project is necessary to provide adequate, reliable, and efficient service and whether it is the least-cost means of doing so. Staff IB at 20, 48 (emphasis added).

Unable to show that the Project is necessary to provide "adequate, efficient, and reliable service," RI claims instead that the Project will *further improve* an already adequate, efficient, and reliable system. For example, although the existing transmission system meets every standard for "loss of load expectation" ("LOLE"), RI claims that the Project could lower it further still. While incremental reliability improvements would seem to have appeal, *improving* a system that is not deficient is not what Section 8-406(b)(1) mandates. Receipt of a CPCN under Section 8-406(b) is proper only when the proposed construction is necessary to provide adequate, reliable, or efficient service. Issuing a CPCN for a proposal on the premise that it will marginally improve some reliability measure would dilute Section 8-406(b)(1)'s "necessity"

[12] RI appears to dispute this, although its evidence is poor. Regardless, the fact that the Project will be saddled with hundreds of millions of additional costs underscores once again how uncertain and incompletely analyzed this Project is at this stage of the RTO review process.

requirement to meaninglessness, because some measure of reliability, no matter how unlikely or far-fetched, is improved by almost any new transmission line.

But most fatal to RI's argument, Section 8-406(b)(1) not only requires a proven reliability need, but requires the Project be proven to be the "least-cost" means of addressing it. Improvements to reliability can have costs ranging from essentially free to the extravagant. Here, the cost of RI's Project alone (not including the hypothetical generators or their interconnection) is nearly $2 billion, some 70% of ComEd's entire ten-year incremental investment budget under the Energy Infrastructure Modernization Act. *See* 220 ILCS 5/16-108.5 (creating a $2.6 billion 10-year target). Not surprisingly, there is no evidence that such an extraordinarily expensive project is the least-cost means of marginally reducing LOLE or improving any other reliability measure. Naumann Dir., ComEd Ex. 1.0 2nd REV, 39:744-49. In sum, even if the Commission decided to invest in greater reliability, there is no evidence that the line is a reasonable, let alone the least-cost way to achieve any reliability improvement.[13]

RI's least-cost evidence is instead directed solely at showing its line is the least-cost way of delivering new wind power. For instance, RI compares the Project to the status quo and the prospect of building additional wind resources in Illinois. *See* RI IB at 68-69. This has nothing to do with whether the Project is the least-cost means of reducing LOLE or increasing reliability. Likewise, RI's comparison between high-voltage direct current ("HVDC") and traditional alternating current technology (*see id.* at 69-72) is directed solely to the best way to build a line

[13] The Commission itself recognized that incremental improvements in reliability should not be pursued regardless of cost even in a case where a local utility's reliability standards are violated. While ComEd does not agree that the principle is applicable in that case, the Commission stated just one week ago, that "it is not unreasonable to consider whether the benefit of achieving the level of reliability … over and above that level determined to be acceptable in the NERC and regional reliability entity standards, is worth the cost … from the ratepayers' perspective." Comments of the Illinois Commerce Commission, *Midwest Independent Transmission System Operator*, FERC Docket No. ER14-1210-000 (Feb. 20, 2014) at 3-4, 6-9. That principle should be applied here, where no reliability violation at all is present or being remedied.

to western Iowa, and it sheds no light on the best way to reduce LOLE or to improve any other measure of reliability.

Nor do the studies highlighted in RI's Initial Brief, *see id.* at 61-67, show that the Project will even enhance system reliability. RI argues that the Project will improve reliability by delivering more supply to load and increasing transmission transfer capability. *Id.*at 61-65. However, as discussed above, the record is entirely unclear whether sufficient demand exists for the Project in the Resource Area. Unless generators are constructed in the Resource Area, the Project will be incapable of delivering electric energy during periods of a shortfall. The Project's contribution to system reliability is questionable in this respect. Additionally, because the Project is nothing more than lengthy, high-voltage generator lead line, its ability to support the system if a transmission outage occurs is limited to injecting energy at ComEd's Collins substation – the electrical equivalent of installing a generator at Collins. And, if RI relies on its newly proposed 765kV interconnection, it will have reintroduced a single point of failure into a project that RI's reliability claims assume is redundant. *See* Galli Sur., RI Ex. 2.15, 42:916-918; *see also* RI IB at 10, 36. There is no evidence that such a plan is the best – or even a reasonably cost-effective – method to improving reliability.

3. RI Has Not Demonstrated That it is Capable of Efficiently Managing and Supervising the Construction Process

RI must demonstrate it "is capable of efficiently managing and supervising the construction process and has taken sufficient action to ensure adequate and efficient construction and supervision" for the Rock Island Project. 220 ILCS 5/8-406(b)(2) (emphasis added). But what RI shows is little more than a plan to contract for the required capability in the future.

As for construction of the line itself, RI does not now have the requisite capability. Indeed, RI's Initial Brief makes clear that it bases its claim on the premise that "it will enter into contracts" that will provide it with such capability. RI IB at 94, 95, 98 (referring to contracts RI

"will" allegedly enter into). At present, however, "Rock Island and Kiewit Power Constructors … do not have a binding [engineering, procurement and construction ("EPC")] contract." Galli, Tr. 748:10-13; *see also* Adam, Tr. 853:21 - 854:15.

RI also asserts it "has contracted with Siemens Energy, Inc. ("Siemens") for provision of the HVDC converter stations." RI IB at 95. But what is broadly characterized as the "contracted" for "provision of the HVDC converter stations" in RI's brief, is only "a memorandum of understanding … for the development phase of the Project." Skelly Reb., RI Ex. 1.4, 15:388-89. RI confirms, rather, that it hopes to enter into "an EPC contract for Siemens to engineer, procure, build, install, and commission the HVDC converters and related equipment at each end of the line," but has not yet done so. *Id.* at 16:406-09. These statements do not meet the statutory requirement.

Even if one overlooked those deficiencies, the clam that certain key personnel at RI and Clean Line could establish the requisite capability is not supported by the record. Personnel such as RI President Mr. Skelly are supporting all five of the Clean Line development projects and there is no assurance or showing they would be available for the Project. As Mr. Skelly stated: "Am I going to be a construction supervisor? I have done that before, but I'm not going to be able to do that on all five of these projects." Skelly, Tr. 275:20-23. Moreover, while RI apparently plans to have an affiliate agreement in place to obtain certain services from its parent to construct and operate the line, it has presented no such agreement. RI's President did not even contemplate the Commission approving the affiliate agreement under Section 7-101 of the PUA. Skelly, Tr. 276:1-21.

4. RI Has Not Demonstrated That it is Capable of Financing the Proposed Construction

Section 8-406(b) requires that an applicant for a CPCN "is capable of financing the proposed construction without significant adverse financial consequences for the utility or its

customers." 220 ILCS 5/8-406(b)(3). This is a requirement that must be met when the CPCN is issued, written in present tense language – a requirement that the applicant "is capable" of financing the proposed construction, not that it has a plan to become capable in the future if the market cooperates. *Id.*; *see* ComEd IB at 33-34. ComEd notes that, in the past, where financing was called into question, the Commission focused on actual revenues and assets of the utility or lenders and affiliates who were committed to support it. *See N. Moraine Wastewater Reclamation Dist. v. Ill. Commerce Comm'n*, 392 Ill. App. 3d 542, 568-69 (2d Dist. 2009) (citing evidence of actual revenues, assets, and equity presently available to operate, maintain, and construct additional facilities).

RI fails this criterion. RI has no assets, credit, or ability to call on equity that would be capable of financing the approximately $1.8 billion cost of the Project. ComEd IB at 34. While RI has obtained venture investments from Clean Line, those investments only finance exploratory development (as opposed to construction) of the Project and the menu of other direct current line concepts Clean Line entities are advancing around the country. Berry, Tr. 1057:12-19. The bottom line is that all of RI's and Clean Line's assets and commitments together amount to less than 2% of the total estimated costs to build the Project. Nothing in RI's Initial Brief even argues – much less demonstrates – otherwise. RI itself acknowledges that, at most, it has a "plan" to raise the capital needed to construct the Project. RI IB at 104. RI's failure to be capable of financing the Project today is dispositive of its Section 8-406 request. The Commission cannot legally award a CPCN to RI.

RI nonetheless devotes a lengthy discussion in its Initial Brief to its financing "plan." RI IB at 104. RI candidly admits the Project is at the "development phase," which ***precedes*** the financing phase, but claims that "there are sound reasons to ***expect*** that lenders and equity investors will … fund the construction of the [RI] Project." *Id.* at 106-107, 109 (emphasis

added). While RI's reliance on its optimistic expectations of future lender behavior is legally insufficient, RI's arguments concerning its future financial plans are also inadequate factually.

RI states it "plans to raise the capital needed for the construction of the Project using a project financing approach." *Id.* at 104-05. A project finance "plan" is a heavily-leveraged approach that requires subscribers to commit to paying RI a stream of revenue sufficient to support equity subscriptions and/or loans from external investors that will fund essentially the entire project. The fact that revenues must be locked in ahead of financing inherently adds yet another layer of risk and uncertainty, as such financing depends both on success in the energy market in pre-subscribing customers and then in the financial market in inducing investors to lend based on those subscriptions. But here, RI faces even greater risk. RI admits not only that signing up such customers is necessary, but that those generation customers do not now even exist. *See* Skelly, Tr. 271:24 - 272:19; Davis, Tr. 235:17-24; Lapson, Tr. 1020:6-7; Berry, Tr. 1117:2-7. Thus, RI's "plan" is contingent not only on its own ability to secure financing from the capital markets, but also on the positive reaction of hypothetical future customers to RI's plan.

Finally, RI may point to its willingness to accept a condition on any CPCN that it will not install transmission facilities for the Project on easement property until it has obtained commitments for funds in an amount equal to or greater than the total project cost. RI IB at 115-117. Whatever else can be said of this unprecedented condition, it does not demonstrate that RI has any present capability to finance the Project, as the law requires. And an applicant must have a capability to finance the project without customer or company harm. Promising that a financial capability RI does not now have will not harm customers if and when that capability is created is a far cry from meeting the statutory requirement. RI's promise neither prevents harm

to customers in the meantime, including being threatened with eminent domain, nor does it prevent harm to the applicant itself, which the law also requires.

B. Route of the Project / Land Acquisition

ComEd has no additional comments in reply to the briefs of other parties.

C. Design and Construction of the Project

ComEd has no additional comments in reply to the briefs of other parties.

V. RI'S REQUEST FOR AN ORDER AUTHORIZING AND DIRECTING CONSTRUCTION UNDER SECTION 8-503

Neither the facts nor RI's interpretation of the PUA support granting RI's request to obtain a Commission Order to construct the proposed Project under Section 8-503. RI IB at 162-66. Initially, RI asserts that the evidence it presented to support a CPCN under Section 8-406(b)(1) also can satisfy Section 8-503. *Id.* at 162-63. ComEd has explained in its Initial Brief and in Section IV.A.1 above why RI has failed to meet the Section 8-406(b)(1) requirements and will not reiterate that discussion here. Given the failure to meet the requirements of Section 8-406(b)(1), there is no basis for the Commission to order RI to construct the project under Section 8-503.

RI, however, also offers an incorrect interpretation of Section 8-503, and three "reasons" to support granting its request to approve the Project under that Section. *Id.* at 164-66. As detailed below, RI's statutory interpretation is wrong, and its alleged reasons offer no basis to authorize the Project under Section 8-503.

A. A Section 8-503 Order Cannot Issue When the Project Is Not Necessary and the Proponent Does Commit to Build It.

To obtain authority under Section 8-503, the Commission must find that "a new structure … is ***necessary*** and ***should be erected***" 220 ILCS 5/8-503 (emphasis added). RI misinterprets the clear and express language of Section 8-503 in a manner inconsistent with the PUA. RI

contends that a Section 8-503 order can authorize or provide permission to construct a project, but not to direct construction. RI IB at 166-67. This interpretation is wrong.

If Section 8-503 is not intended to direct construction, it would duplicate Section 8-406. *See, e.g., A.P. Properties, Inc. v. Goshinsky*, 186 Ill. 2d 524, 532-33 (1999) (rejecting construction of a statute that rendered the statutory phrase meaningless or superfluous). Such a construction should be rejected. RI's position also fails to consider the language in Section 8-503 requiring the Commission to find that approved "additions…ought reasonably to be made" and "structure … *should* be erected," indicative of the legislature's intent that this Section apply to projects that are more than just optional. 220 ILCS 5/8-503. The interpretation that Section 8-503 requires RI to construct the Project is further supported by the exception in that Section. Section 8-503 includes an exception for electric generating plants that states that the Commission shall have no authority to "order the construction … of any electric generating plant." If RI's assertion was correct, and a Section 8-503 order was not compulsory and did not require an attempt to construct, this exception would not be necessary. *A.P. Properties, Inc. v. Goshinsky*, 186 Ill. 2d 524, 532-33.

Also, unlike Section 8-406, Section 8-503 *should* not be permissive, because this Section serves as the prerequisite before an applicant such as RI can obtain eminent domain authority under Section 8-509 of the PUA. 220 ILCS 5/8-509. A Commission finding that a project must be built to support the public interest goes hand-in-hand with the added powers of condemnation made available under Section 8-509.

Proper application of Section 8-503 requires the Commission to deny RI's request to approve the Project under this Section. The unrebutted facts show:

- RI admitted it will not begin construction on the installation of permanent facilities for the Project until a need is established. RI Ex. 10.13, 3:96 - 4:111;

- The FERC-jurisdictional interconnection planning process has not been completed. McDermott, Tr. 154:17 - 155:3;

- RI cannot identify what generators (if any) it will serve, Wallack, Tr. 820:3-5; McDermott Tr. 122:22 - 123:5; Galli, Tr. 753: 1-3; Berry, Tr. 1061: 2-19;

- RI has no binding contracts with shippers (Berry, Tr. 1061:2-19, 1117:8 - 1118:3) and the Project is unlikely to be built with only 60% of the capacity contracted. Naumann Dir., ComEd Ex. 1.0 2nd Rev., 10:193-6 and fn.8; Berry Add'l Supp. Dir., RI Ex. 10.13, 4:106-10; Berry Tr. 1120:15-23; and

- RI may abandon or delay the Project if it does not obtain approval from the Iowa Commission for the 379 mile segment of the line proposed to traverse Iowa. Skelly, Tr. 235:8-13

Given RI's unwillingness to commit to constructing the project now and the array of uncertainties surrounding the Project, the Commission cannot authorize the project under Section 8-503.

B. RI's Arguments for a Section 8-503 Order Are Invalid under the PUA

RI (IB at 164-66) offers three for reasons it seeks a Section 8-503 order. :

1. RI needs to show "potential" customers, lenders and investors, that RI has obtained a "major" regulatory approval. *Id*. Included in this "major" regulatory approval is the ability to show potential customers, lenders and investors that it can obtain eminent domain authority. *Id*.

2. Requesting Section 8-503 authority in a separate proceeding would be duplicative and waste the Commission's and other parties' resources. *Id*. at 165.

3. Failure to obtain Section 8-503 authority now would create "regulatory uncertainty" for "potential" customers, lenders and investors." *Id*. at 166.

None of these reasons justify RI's request. While RI claims its reasons are interrelated with its Section 8-406(b)(1) request, Section 8-503 is distinct and RI must meet the requirements of

Section 8-503 on its own merits.[14] *Id*. at 164. Moreover, RI's emphasis on its desire to secure a Section 8-503 order as a precursor to utilizing eminent domain, *id*. at 164-65, is yet another reason to reject RI's request, as discussed in Section C.

1. A Section 8-503 Order Is Not A Business Development Tool

Obtaining authority to construct a project under Section 8-503 was never contemplated to, nor should it be, used as a tool to attract "potential" customers, lenders or investors. RI offers no authority, and there is none, to support such a use. RI IB at 164-65. Rather, a Section 8-503 proceeding evaluates the need and public interest requirements supporting a proposed project and, if the Commission finds that the evidence meets the requirements of that Section, to direct a utility to construct the project. Nothing in Section 8-503 provides for its use as a marketing tool.

2. RI's Assertion that Granting Section 8-503 Authority Would Avoid Duplication Is Meritless

RI's second "reason" fares no better. By its own agreement, it must come before the Commission again in a separate proceeding to obtain final eminent domain authority. RI IB at 164, fn.147. There is no need for a proper Section 8-503 proceeding to be repetitious. If issues that must be decided under Section 8-406(b)(1) are substantially similar to those at issue under Section 8-503, as RI claims (*see* RI IB at 166), RI can ask the Commission to take notice of those findings in a future Section 8-503 proceeding. *See* 83 Ill. Adm. Code § 200.640 (authorizing notice) The remaining issues will be those that are no duplicative, such as whether the Project is essential and warrants using eminent domain.

3. RI's Assertions About The Need For "Regulatory Certainty" Ignore The Complete Uncertainty Surrounding RI's Project

[14] Of course, as pointed out in Section IV of ComEd's Initial Brief and this Reply, RI has also failed to meet the requirements of Section 8-406(b)(1).

RI also claims that is needs Section 8-503 approval to provide "potential" lenders and investors with "regulatory certainty." RI IB at 166. This claim is remarkable given the complete lack of certainty surrounding all aspects of the Project, including whether RI will even construct the Project. The record is replete with admissions from RI witnesses, and testimony and evidence from other parties, detailing the various contingencies that must otherwise be met before RI considers proceeding with construction.[15] *See, e.g.*, Skelly, Tr. 269:9 - 271:3. RI also cannot explain how a Section 8-503 order is more "certain" from a regulatory standpoint than a CPCN alone. Moreover, nowhere does Section 8-503, or any other part of the PUA, authorize issuing a Section 8-503 order for this reason. Such orders vindicate the public interest, not private speculators' attempt to inflate potential lender confidence.

RI also claims it is not unusual for the Commission to issue both a CPCN under Section 8-406 and grant authority for a project under Section 8-503. But, RI ignores that these orders occurred in response to "usual" factual showings, and there is nothing "usual" about its request. RI IB at 166. It need not be repeated just how contingent and uncertain the Project is, nor that RI itself does not commit to build it. The four Ameren orders RI cites stand in stark contrast. *Id.* In those cases, there was no question that Ameren would build the Projects and no party *ever* objected to the need for the lines. *See Central Illinois Pub. Serv. Co. d/b/a/ AmerenCIPS*, Docket 07-0532 (May 6, 2009); *Illinois Power Co. d/b/a AmerenIP and Ameren Illinois Transmission Co.*, Docket 06-0706 (Mar. 11, 2009; *Illinois Power Co. d/b/a AmerenIP and Ameren Illinois Transmission Co.*, Docket 06-0179 (May 16, 2007). And, in the fourth case, all "need" issues were resolved prior to the matter being briefed. *Illinois Power Co. d/b/a*

[15] For example, RI witness Mr. Berry stated that "permanent installation of facilities cannot and will not commence unless and until the need for the Project is actually established through the market test of transmission customers contracting for sufficient service on the transmission line …." Berry Add'l Supp. Dir., RI Ex. 10.13, 4:107-10.

AmerenIP, Docket 10-0079, at 13. (Apr. 12, 2011). RI's effort to compare its request here to traditional transmission line dockets cannot withstand scrutiny.

C. RI Cannot Justify the Taking of Private Property on this Record; RI's Desire to Exploit that Power is an Additional Reason to Deny RI a Section 8-503 Order

RI emphasizes its ability to use eminent domain powers as a marketing point with its "potential" lenders and investors. Nothing in the PUA suggests that one of the legislative goals of Section 8-503 was to aid marketing projects to prospective lenders or investors. In reality, if RI's position is adopted, private property owners along a 121-mile corridor in Illinois will be subject to a cloud over their property rights for an unknown period of time, all for a project that may never be built. There is no basis, and RI points to no authority, to impose such a burden on private property owners for such a speculative project.

Historically, the Commission has carefully considered the circumstances under which it will grant an entity the ability to condemn private property for utility purposes. *See, e.g.*, *Ameren Illinois Co.*, Docket 13-0516, at 3 (Oct. 23, 2013). The right is limited to cases where the Commission could find that the public interest is definitively met. In contrast, RI seeks to use the threat of eminent domain although it may never even build the Project. As Mr. Berry stated that "permanent installation of facilities cannot and will not commence unless and until the need for the Project is actually established through the market test of transmission customers contracting for sufficient service on the transmission line." Berry Add'l Supp. Dir., RI Ex. 10.13, 4:107-110.

ComEd has presented substantial and compelling evidence to demonstrate that RI has failed to meet the "need" requirement to be awarded a CPCN. ComEd IB at 36-41. ComEd is not alone. Staff has determined the Project is not necessary, and that the integrity of Illinois' transmission system will not be compromised if the Project is not built. Staff IB at 19; Rashid

Dir., Staff Ex. 1.0 at 8. Like ComEd, Staff found it noteworthy that neither MISO nor PJM has determined a need for the Project. Staff IB at 46. Ultimately, Staff concluded that it "cannot be confidently stated, based on this record, that Rock Island has shown here that the Project is necessary to provide adequate, reliable, efficient service." *Id.* at 48. Under those facts, the Commission should be reticent – not eager – to grant RI a Section 8-503 order.

VI. RI'S ACCOUNTING-RELATED REQUESTS

ComEd expresses no position on this subject in this Docket.

VII. CONCLUSION / REQUEST FOR RELIEF

For all of the reasons stated herein and in ComEd's Initial Brief, Rock Island's Petition should be denied without prejudice.

Dated: February 27, 2014

Respectfully submitted,

COMMONWEALTH EDISON COMPANY

By: _____
One of its Attorneys

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